

TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of:

Herring Broadcasting, Inc Wealth TV
v
Time Warner Cable, Inc et al

MB Docket No. 08-214

ORIGINAL

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WASHINGTON, D.C. 20005
TELEPHONE (202) 234-4433

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

PRE-HEARING CONFERENCE

In the Matter of:

HERRING BROADCASTING, INC. MB Docket No.
WEALTH TV, 08-214 d/b/a
Complainant,

v. File No.
CSR-7709-P

TIME WARNER
CABLE, INC.,
Defendant;

HERRING BROADCASTING, INC. File No.
d/b/a WEALTH TV, CSR-7822-P
Complainant,

v.

BRIGHT HOUSE NETWORKS, LLC,
Defendant;

HERRING BROADCASTING, INC. File No.
d/b/a WEALTH TV, CSR-7829-P
Complainant,

v.

COX COMMUNICATIONS, INC.
Defendant;

HERRING BROADCASTING, INC. File No.
d/b/a WEALTH TV, CSR-7907-P
Complainant,

v.

COMCAST CORPORATION,
Defendant;

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NFL ENTERPRISES, LLC,
Complainant,

File No.
CSR-7876-P

v.

COMCAST CABLE
COMMUNICATIONS, LLC,
Defendant;

TCR SPORTS BROADCASTING
HOLDING, LLP, d/b/a MID-
ATLANTIC SPORTS NETWORK
Complainant,

File No.
CSR-8001-P

v.

COMCAST CORPORATION,
Defendant.

Monday
October 27, 2008

9:30 a.m.

TW A-363
445 Twelfth Street, S.W.
Washington, D.C.

BEFORE:

ARTHUR I. STEINBERG,
Administrative Law Judge

APPEARANCES:

On Behalf of Complainant Herring
Broadcasting, Inc. d/b/a Wealth TV:

KATHLEEN WALLMAN, Esq.
Kathleen Wallman, PLLC
(202) 641-5387
wallmank@wallman.com

GEOFFREY M. KLINEBERG, Esq.
Kellogg, Huber, Hansen, Todd, Evans &
Figel, PLLC
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (fax)
gklineberg@khhte.com

On Behalf of Defendant Time Warner
Cable, Inc.:

ARTHUR H. HARDING, Esq.
Fleischman and Harding, LLP
1255 23rd Street, N.W.
Eighth Floor
Washington, D.C. 20037
(202) 939-7900
(202) 939-7904 (fax)
aharding@fh-law.com

JAY COHEN, Esq.
Paul, Weiss, Rifkind, Wharton &
Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3163
(212) 492-0163 (fax)
jaycohen@paulweiss.com

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WASHINGTON, D.C. 20005-3701

On Behalf of Defendant Bright House
Networks, LLC:

R. BRUCE BECKNER, Esq.
Fleischman and Harding, LLP
1255 23rd Street, N.W.
Eighth Floor
Washington, D.C. 20037
(202) 939-7913
(202) 387-3467
bbeckner@fh-law.com

On Behalf of Defendant Cox
Communications, Inc.:

DAVID E. MILLS, Esq.
J. CHRISTOPHER REDDING, Esq.
DowLohnes
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802
(202) 776-2865
(202) 776-4865 (fax)
dmills@dowlohn.es.com
credding@dowlohn.es.com

On Behalf of Comcast Corporation and
Comcast Cable Communications, LLC:

DAVID H. SOLOMON, Esq.
L. ANDREW TOLLIN, Esq.
Wilkinson Barker Knauer, LLP
2300 N Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 783-4141
(202) 783-5851 (fax)
dsolomon@wbklaw.com
latollin@wbklaw.com

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On Behalf of Comcast Corporation and
Comcast Cable Communications, LLC:

DAVID TOSCANO, Esq.
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
(212) 450-4000
(212) 450-3515 (fax)
david.toscano@dpw.com

JAMES L. CASSERLY, Esq.
WILLKIE FARR & GALLAGHER, LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
(202) 303-1119
jcasserly@willkie.com

On Behalf of Complainant NFL Enterprises, LLC:

JONATHAN BLAKE, Esq.
GREGG H. LEVY, Esq.
Covington & Burling, LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5292
(202) 662-6804
glevy@cov.com

On Behalf of Complainant TCR Sports
Broadcasting Holding, LLP, d/b/a/ Mid-Atlantic
Sports Network:

DAVID C. FREDERICK, Esq.
KELLY P. DUNBAR, Esq.
Kellogg, Huber, Hansen, Todd, Evans &
Figel, PLLC
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (fax)
dfrederick@khhte.com
kdunbar@khhte.com

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On Behalf of the Enforcement Bureau:

GARY SCHONMAN, Esq.
ELIZABETH MUMAW, Esq.
Investigations and Hearings Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(202) 418-1795
(202) 418-5916
gary.schonman@fcc.gov

KRIS ANNE MONTEITH
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 7-C485
Washington, D.C. 20554
(202) 418-7450
(202) 418-2810

ALSO PRESENT:

ANASTASIA DANIAS, NFL Enterprises
GARY GERTZOG, NFL Enterprises
SARAH L. GITCHELL, Esq., Comcast Cable
MICHAEL H. HAMMER, Esq. Willkie Farr &
Gallagher, for Comcast Corporation
J. WADE LINDSAY, Esq. Wilkinson Barker
Knauer, for Comcast Corporation
LEAH POGOILEV, Covington & Burling, for
NFL Enterprises
ROBERT SHOOMAN, Covington & Burling, for
NFL Enterprises
JEFF ZIMMERMAN, Time Warner

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P R O C E E D I N G S

9:33 A.M.

JUDGE STEINBERG: This is a pre-hearing conference in MB Docket No. 08-214. My memorandum of opinion and order and hearing designation order, VA 08-2269 released October 10, 2008 and in an erratum thereto released October 15, 2008, the Chief Media Bureau consolidated six separate program carriage complaints against multi-channel video program distributors and designated them for hearing.

One issue common in all six cases seeks to determine whether the Defendant has discriminated against the Complainant's programming in favor of its own programming with the effect of unreasonably restraining the Complaint's ability to compete fairly in violation of the Commission's rules.

Another issue relating to only one complaint seeks to determine whether the Defendant demanded a financial interest in the Complainant's programming in exchange for

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1 carriage in violation of the Commission's
2 rules.

3 If it is found that these
4 violations occurred, an appropriate remedy is
5 to be recommended. By order FCC 08-M-43,
6 released October 22, 2008, the Chief
7 Administrative Law Judge assigned this case to
8 me and scheduled a pre-hearing conference for
9 this morning.

10 In addition, I issued an order,
11 FCC-0-M-44 released October 23, 2008 in which
12 I placed the burden of proceeding with the
13 introduction of evidence and the burden of
14 proof on all issues on the Complainants,
15 established a procedural schedule and ruled
16 that under the time constraints imposed in the
17 hearing designation order, discovery would not
18 be practicable and will not therefore be
19 permitted.

20 Before I formally take
21 appearances, I'd like to disclose to the
22 parties that I receive cable service at my

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1 home from Comcast. If anybody objects to me
2 presiding on that basis or any other basis,
3 you can speak up now. I don't think my
4 getting my home cable from Comcast is going to
5 affect anything undue in this case.

6 And FiOS isn't available in my area, so I
7 can't switch for the duration of this case.
8 So that was a joke. You can all laugh.

9 (Laughter.)

10 Okay, that cut the ice, I think.

11 Hearing no objection, I'll guess
12 we'll continue.

13 Now let me take, formally take the
14 appearances of counsel. For Herring
15 Broadcasting, Inc., d/b/a as Wealth TV?

16 MS. WALLMAN: Kathleen Wallman.

17 JUDGE STEINBERG: How about
18 Geoffrey Klineberg. He entered an appearance?

19 MR. KLINEBERG: Your Honor, I'm
20 Geoffrey Klineberg and I'm also here on behalf
21 of Herring --

22 JUDGE STEINBERG: Okay, before we

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1 finish today, could you just jot down your
2 email address and your phone number and I can
3 add you to my email distribution list in case
4 I issue an order or something?

5 MR. KLINEBERG: Absolutely.

6 JUDGE STEINBERG: Okay. How about
7 Time Warner Cable, Incorporated?

8 MR. HARDING: Arthur Harding,
9 Fleischman and Harding.

10 JUDGE STEINBERG: And Jay Cohen?

11 MR. COHEN: Jay Cohen from Paul,
12 Weiss.

13 JUDGE STEINBERG: Okay, I'm not
14 going to ask Wealth TV -- I mean do you
15 represent Wealth at all, for the cases?

16 MS. WALLMAN: That's correct, Your
17 Honor.

18 JUDGE STEINBERG: Okay, Bright
19 House Networks?

20 MR. BECKNER: Bruce Beckner,
21 Fleischman and Harding.

22 JUDGE STEINBERG: How about Mr.

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1 Steinhauser?

2 MR. BECKNER: He's not here today.

3 JUDGE STEINBERG: But he is --

4 MR. BECKNER: He's counsel of
5 record. He's a resident of New York City.

6 JUDGE STEINBERG: Okay. Cox
7 Communications.

8 MR. MILLS: David Mills from
9 DowLohnes. And also Chris Redding.

10 JUDGE STEINBERG: Comcast?

11 MR. SOLOMON: David Solomon from
12 Wilkinson, Barker Knauer.

13 JUDGE STEINBERG: And also how
14 about Mr. Casserly?

15 MR. CASSERLY: Here, Your Honor.

16 JUDGE STEINBERG: And you're --

17 MR. TOLLIN: I'm also Andy Tollin.
18 Wilkinson Barker Knauer.

19 JUDGE STEINBERG: And it's Comcast
20 -- you represent Comcast Corporation and
21 Comcast Cable Communications.

22 NFL Enterprises?

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1 MR. BLAKE: John Blake and Gregg
2 Levy.

3 JUDGE STEINBERG: Okay, and TCR
4 Sports?

5 MR. FREDERICK: David Frederick
6 and Kelly Dunbar.

7 JUDGE STEINBERG: And for the
8 Chief Enforcement Bureau?

9 MR. SCHONMAN: Good morning, Your
10 Honor. Seating to my left is Kris Anne
11 Monteith, Chief Enforcement Bureau. My name
12 is Gary Schonman. I'm appearing on behalf of
13 the Enforcement Bureau and my co-counsel is
14 Elizabeth Mumaw.

15 JUDGE STEINBERG: Could you spell
16 that for me?

17 MR. SCHONMAN: M-U-M-A-W.

18 JUDGE STEINBERG: Thank you.
19 Okay, the first thing that I want to do is try
20 to go through what I have pending before me at
21 the present time.

22 I made a list of these things and

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1 if -- please stop me or correct me if I'm
2 incorrect and I'll do it case by case. And at
3 the end of each case you can tell me if
4 there's anything else that I should know
5 about.

6 In the Wealth TV versus Time
7 Warner, we've got a motion for modification
8 and clarification or in the alternative for
9 certification of questions and that was dated
10 October 20th. And then there was a revised
11 page one that was submitted.

12 Okay. I don't have any stamped
13 copy, Secretary stamped copy of these things.
14 Could you just email me or fax me just the
15 cover page showing the Secretary's stamps so
16 that I know it's been filed. Otherwise I
17 won't know it's filed.

18 MR. HARDING: Your Honor, will a
19 certification that it's been filed
20 electronically in the docket --

21 JUDGE STEINBERG: Oh, yes, you get
22 that little back page, right?

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1 MR. HARDING: And do we have
2 discretion to do either or both?

3 JUDGE STEINBERG: Yes, Is there
4 any reason why you can't electronically file?

5 I don't know of any. Do you know
6 of any, Mr. Schonberg, why pleadings can't be
7 electronically filed?

8 And then they get the little
9 receipt that's usually stuck to the back of
10 the pleading?

11 MR. SCHONMAN: Your Honor,
12 personally, I don't know of any reason why
13 they can't other than from my experience an
14 electronic filing has been used in rulemaking
15 proceedings. Of course, this is not that type
16 of case.

17 JUDGE STEINBERG: I've had a
18 couple of cases, the Wall case, they've been
19 electronically filing routinely and nobody has
20 ever raised it.

21 I don't have any problem with it,
22 as long as it gets here in some fashion.

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1 Okay, this was served by mail and
2 so far I've not received a response to it. By
3 my calculation the response will be due this
4 Thursday, the 30th. And a reply is permitted.
5 This is on a 1.294, the Commission's rules.
6 Is Time Warner going to respond to it?

7 MR. HARDING: The filing?

8 JUDGE STEINBERG: Pardon me, my
9 apologies. Is Wealth TV going to respond to
10 it?

11 MS. WALLMAN: Yes, Your Honor, we
12 will.

13 JUDGE STEINBERG: Okay, but it's
14 due on the 30th. If you want to make -- we'll
15 talk about that later. And then reply is
16 permitted.

17 Okay, now we go to the second
18 case, Wealth TV versus Bright House. In a
19 letter filed October 20th from Arthur J.
20 Steinhauser, counsel for Bright House, and
21 it's entitled Request for Modification and
22 Certification, the "of" is left out, but I'll

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1 put "of HDO or in the Alternative for
2 Certification of Application for Review." The
3 letter, as I said, it's filed October 20th.
4 It's dated October 20th. And then there was
5 a letter filed October 21st from Mark Denbo
6 which was an erratum to request for
7 modification and clarification of HDO or in
8 the alternative for certification of
9 application for review.

10 Did -- Ms. Wallman, did you
11 receive that?

12 MS. WALLMAN: Yes, I did, Your
13 Honor.

14 JUDGE STEINBERG: Okay, so there's
15 no problem with service?

16 MS. WALLMAN: No, Your Honor.

17 JUDGE STEINBERG: Okay. This is a
18 letter pleading and the Commission's rule
19 don't count this letter of pleadings. And in
20 the routine case, I would have already issued
21 an order dismissing both the letter and the
22 erratum because they're letter pleadings.

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1 However, in this particular case,
2 it doesn't make much sense to do that because
3 then all the party would do, all Bright House
4 would do would be to stick a caption on it and
5 refile it. So in order to save time, I'll
6 rule now that I'll accept the two letter
7 pleadings and -- but I won't in the future.
8 If you have a pleading file, stick a caption
9 on it and file it and attach a certificate of
10 service and etcetera.

11 MS. WALLMAN: Pardon me, Your
12 Honor.

13 JUDGE STEINBERG: Yes.

14 MS. WALLMAN: If I may, it may be
15 that if refiled, those pleadings would be out
16 of time.

17 JUDGE STEINBERG: Then I'll waive
18 the time limit. I mean let's get this stuff
19 out of the way before we proceed to serious
20 stuff.

21 I don't mean to say serious stuff
22 lightly.

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1 By my calculation a response to
2 that would be due on the -- October 30th or on
3 Tuesday, November 4th, depending on the method
4 of service. How did you receive it, by email
5 or by mail?

6 MS. WALLMAN: I received it in
7 both methods.

8 JUDGE STEINBERG: Both, okay, so
9 it's a 10-day and so the due date would be
10 October 30th, same as the other one. And you
11 intend to respond to it?

12 MS. WALLMAN: Yes, Your Honor.

13 JUDGE STEINBERG: Okay. On that
14 one, a reply is permitted.

15 MR. BECKNER: Thank you, Your
16 Honor.

17 JUDGE STEINBERG: I think you've
18 got five days for the reply.

19 Next one is Wealth TV versus Cox.
20 And if you've got a motion to clarify hearing
21 designation order or in the alternative to
22 certify questions to the Commission. And this

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1 one is dated October 20, '08, filed by Cox.

2 I don't have a stamped copy of
3 that one or -- if you just get me the cover
4 page or the receipt page and then I'll know
5 it's filed.

6 That one was served by mail, so
7 the due date would be November 4th, unless you
8 consent to consolidate on the 30th, Ms.
9 Wallman, or do you want to wait until the 4th,
10 that's fine. You're certainly within your
11 rights.

12 MS. WALLMAN: Your Honor, thank
13 you. I think we can file responses to all of
14 them on Thursday.

15 JUDGE STEINBERG: Okay, so we'll
16 make it due on the 30th. And a reply is
17 permitted to that one.

18 The next one we have is a request,
19 actually why don't I just get all three of
20 them done at the same time.

21 We have three requests for
22 certifications to the Commission, filed

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1 October 21st. You don't want to know why, but
2 they were dated October 20th and they have a
3 Bureau Office stamp of the 20th, but they have
4 the Secretary's stamp of the 21st so
5 technically they're filed on the 21st, but it
6 doesn't really matter.

7 So there's one filed against
8 Wealth TV. One filed against NFL Enterprises.
9 One filed against TCR Sports. And they were
10 all the same date. I think all the same
11 title.

12 They were all served by hand and
13 email so that's a four-day response time. And
14 the due date on that is today. Let's start
15 with Wealth. Do you intend to file?

16 MS. WALLMAN: Yes, Your Honor.

17 JUDGE STEINBERG: And how about
18 let me see NFL?

19 MR. BLAKE: We intend to respond
20 today as well.

21 JUDGE STEINBERG: And TCR?

22 MR. FREDERICK: The same, sir.

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1 JUDGE STEINBERG: Okay, and we've
2 all got the same due date? Okay, and then
3 that's an interlocutory pleading because it
4 doesn't ask for modification in the issue, so
5 it goes into the four-day category. And
6 there's no reply permitted on those.

7 Then there was a letter to Judge
8 Sippel filed on October 22nd from Mr. Blake.
9 This is the NFL v. Comcast case and I have to
10 ask a rhetorical question. This wasn't meant
11 to be a response to the Comcast pleading, was
12 it?

13 MR. BLAKE: That's right. It was
14 not intended.

15 JUDGE STEINBERG: Okay, so you
16 respond separately to that.

17 And finally, we've got a motion to
18 strike filed on October 10, 08 by Comcast in
19 7907. Which one is 7907? That's the Wealth
20 TV.

21 And it was directed to the Chief
22 of the Media Bureau and then there was a

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1 response to the motion to strike dated the
2 24th of October by Wealth TV that was directed
3 to me. So we've got something directed to the
4 Bureau. Something directed to me.

5 I think I'll let the Bureau handle
6 this one, although what Ms. Wallman does, the
7 two paragraphs that you objected to in the
8 motion to strike, she just withdrew them.

9 MR. SOLOMON: That's fine.

10 JUDGE STEINBERG: Okay, so you
11 want to withdraw your motion to strike?

12 MR. SOLOMON: Yes.

13 JUDGE STEINBERG: Yes, sure.
14 Okay, so I'll issue, I might issue a ruling
15 saying since it's been withdrawn, the two
16 pleadings are dismissed is moot. Okay, that's
17 taken care of.

18 MR. SOLOMON: Your Honor, can I
19 ask you one question about the schedule that
20 you went through?

21 JUDGE STEINBERG: Sure.

22 MR. SOLOMON: Our pleading did

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1 request in the alternative clarification, it
2 wasn't in the title, but in the text, so since
3 everyone else is getting a reply, can we get
4 a reply as well?

5 JUDGE STEINBERG: Let me read the
6 -- do you have any objection to that? We'll
7 extend the deadline to the 30th to make them
8 all uniform.

9 MS. WALLMAN: In that event, we
10 have no objection to a reply.

11 JUDGE STEINBERG: Mr. Blake?

12 MR. BLAKE: Well, I'm having a
13 little trouble visualizing how that would
14 work, actually.

15 JUDGE STEINBERG: Oh, essentially
16 your response would be due the 30th instead of
17 today and Comcast would have five days, five
18 business days to reply. And if you serve them
19 by email, I don't give extra time for mailing.

20 MR. BLAKE: What I was trying to
21 understand was whether there is this discrete
22 part of the pleading that is subject to

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1 clarification and the rest of the pleading is
2 subject to certification or whether it's the
3 whole pleading and it's in the alternative.

4 JUDGE STEINBERG: You can respond
5 to everything on the 30th. Whatever is in
6 there.

7 MR. FREDERICK: Your Honor, I
8 think the point is that the certification is
9 really framed to certification. It's not
10 framed as clarification.

11 JUDGE STEINBERG: Okay. Show me
12 in the pleading where -- it will save me a lot
13 of reading.

14 MR. SOLOMON: Page two in the
15 summary, it says Comcast believes that the ALJ
16 has authority to rectify some of these
17 problems on its motion to amend the hearing.
18 To the extent that the ALJ deems its
19 discretion to correct these areas is
20 constraining, the matters should be certified
21 to the Commission.

22 JUDGE STEINBERG: Where does it

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1 point out that there's an error in the framing
2 of the issues or request for modification and
3 clarification of the issues?

4 MR. SOLOMON: The issues, the
5 second section is entitled -- or first section
6 is entitled on all, the HDO failed to provide
7 sufficient guidance because it appears to
8 misconstrue the applicable legal standards.

9 It's saying that we think that you
10 have discretion to clarify it, but that if you
11 don't, it should be certified by the
12 Commission.

13 It says at the end of that
14 section, while Comcast would welcome any
15 action by the presiding Judge or Chief ALJ
16 because it hadn't been assigned to a presiding
17 Judge yet, to clarify these matters to the
18 extent the ALJ believes it lacks authority to
19 do so, certification is requested as set forth
20 above.

21 MR. BLAKE: Your Honor, I guess
22 what our view would be is that we will proceed

NEAL R. GROSS

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